

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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IN RE: WESTERN STATES
WHOLESALE NATURAL GAS
ANTITRUST LITIGATION,

2:06-CV-1351-PMP-PAL

BRECKENRIDGE BREWERY OF
COLORADO, LLC, et al.,

2:03-CV-1431-PMP-PAL
BASE FILE

Plaintiffs,

ORDER

v.

ONEOK, INC., et al.,

Defendants.

Presently before the Court is Specially Appearing Defendant CenterPoint Energy, Inc.'s Motion to Dismiss and Memorandum of Points and Authorities in Support (2:03-CV-1431-PMP-PAL, Doc. #460), filed on January 22, 2007. On February 5, 2007, Plaintiffs filed a Response to Defendants'¹ Motions to Dismiss on Personal Jurisdiction Grounds (2:06-CV-1351-PMP-PAL, Doc. #39). Defendants filed a Reply Memorandum in Support of Specially Appearing Defendants' Motions to Dismiss for Lack of Personal Jurisdiction (2:03-CV-1431-PMP-PAL, Doc. #477) on February 20, 2007.

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¹ Four different Defendants filed motions to dismiss for lack of personal jurisdiction in this case raising similar issues and making similar arguments. Plaintiffs filed a consolidated response addressing three of the four motions to dismiss based on personal jurisdiction. Those three defendants subsequently filed a joint reply.

1 **I. BACKGROUND**

2 This case is one of many in consolidated Multi District Litigation arising out of
3 the energy crisis of 2000-2001. Plaintiffs originally filed the above action in the District
4 Court of the City and County of Denver, Colorado. (Notice of Removal, Compl. [2:06-CV-
5 1351-PMP-PAL, Doc. #2].) Defendants removed the case to the United States District
6 Court for the District of Colorado. (Id.) The Judicial Panel on Multidistrict Litigation
7 entered a Transfer Order pursuant to 28 U.S.C. § 1407 centralizing the foregoing action in
8 this Court for coordinated or consolidated pretrial proceedings. (Letter dated November 2,
9 2006 [2:06-CV-1351-PMP-PAL, Doc. #29].)

10 In this litigation, Plaintiffs seek to recover damages on behalf of natural gas rate
11 payers. In the Complaint, Plaintiffs allege Defendants conspired to engage in anti-
12 competitive activities with the intent to manipulate and artificially increase or control the
13 price of natural gas for consumers. (Compl. at 31-35.) Specifically, Plaintiffs allege
14 Defendants knowingly delivered false reports concerning trade information and engaged in
15 wash trades, which conduct violated Colorado Revised Statutes § 6-4-101, et seq.
16 (“Colorado antitrust statutes”). (Id.)

17 Plaintiff Breckenridge Brewery of Colorado, LLC (“Breckenridge Brewery”) is a
18 Colorado limited liability company with its principal place of business in Denver, Colorado.
19 (Id. at 3.) Plaintiff BBD Acquisition Co. (“BBD”) is a Colorado corporation with its
20 principal place of business in Denver, Colorado. (Id.) Plaintiffs allege they purchased
21 natural gas directly from one or more Defendants, and from other natural gas sellers in the
22 State of Colorado, during the past six years. (Id.)

23 According to Plaintiffs’ Complaint, Defendant CenterPoint Energy, Inc.
24 (“CenterPoint”) is a Texas corporation in good standing with its principal place of business
25 in Houston, Texas. (Id. at 24.) Plaintiffs allege that as part of a corporate restructuring of
26 former Reliant Energy, Inc. (former “REI”) in January 2002, CenterPoint became the parent

1 of Defendant Reliant Energy Services, Inc. (“RES”) and Reliant Resources, Inc (“RRI”).
2 (Id.) Plaintiffs aver Centerpoint wholly controls and dominates RES and is therefore liable
3 for RES’s illegal acts. In addition, Plaintiffs allege Centerpoint, through its affiliates, “buys
4 and sells natural gas, including its own or its affiliates’ production, in the United States and
5 in the State of Colorado.” (Id.)

6 Under Federal Rule of Civil Procedure 12(b)(2), CenterPoint moves to dismiss
7 for lack of personal jurisdiction because Plaintiffs’ allegations are insufficient, incorrect,
8 and are based on a misunderstanding of the relationship between CenterPoint and RES and
9 REI. In support of its motion to dismiss, CenterPoint filed a Declaration of Richard B.
10 Dauphin (“Dauphin”), Assistant Corporate Secretary and Senior Counsel of CenterPoint.
11 Dauphin’s Declaration states that former REI was separated into two independent publicly
12 traded companies, CenterPoint and RRI, in September 2002. (Specially Appearing Def.
13 CenterPoint Energy Inc.’s Mot. to Dismiss & Memo. of Points & Authorities in Support,
14 Ex. A, Decl. of Richard Dauphin [“Dauphin Decl.”], at 1.) Dauphin states that CenterPoint
15 became the holding company of virtually all the Public Utility Commission-regulated utility
16 subsidiaries of former REI. (Id.)

17 Dauphin states that in April 2004, RRI changed its name to Reliant Energy, Inc.
18 (“New REI”). Id. Dauphin also states “CenterPoint has no corporate relationship with, or
19 ownership interest in RES, its parent, New REI, or any of New REI’s direct or indirect
20 subsidiaries.” (Id. at 2.) In addition, Dauphin declares that CenterPoint is a public utility
21 holding company and therefore has no operations of its own; has never conducted any
22 business in Colorado; has never bought, sold, or traded natural gas or reported natural gas
23 prices; does not have any offices, employees, telephone listings or mailing addresses in
24 Colorado; has never paid taxes to or owned any real property in Colorado; does not have,
25 and has never been required to have, a resident agent in Colorado; and has never held board
26 or shareholder meetings in Colorado. (Id. at 2-3.) Consequently, CenterPoint argues the

1 Court should dismiss it for lack of personal jurisdiction because it is not liable for
 2 Defendant RES's alleged illegal acts, Plaintiffs failed to allege CenterPoint participated in a
 3 conspiracy with the other Defendants, and exercising jurisdiction would violate due
 4 process.

5 **II. DISCUSSION**

6 “When a defendant moves to dismiss for lack of personal jurisdiction, the
 7 plaintiff bears the burden of demonstrating that the court has jurisdiction over the
 8 defendant.” Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1154 (9th Cir. 2006). To meet this
 9 burden, a plaintiff must demonstrate that personal jurisdiction over a defendant is (1)
 10 permitted under the applicable state's long-arm statute and (2) that the exercise of
 11 jurisdiction does not violate federal due process. Id. In diversity cases such as this, “a
 12 federal court applies the personal jurisdiction rules of the forum state provided the exercise
 13 of jurisdiction comports with due process.” Scott v. Breeland, 792 F.2d 925 (9th Cir.
 14 1986). However, “federal law is controlling on the issue of due process under the United
 15 States Constitution.” Data Disc, Inc. v. Sys. Tech. Assoc., Inc., 557 F.2d 1280, 1286 n.3
 16 (9th Cir. 1977). Therefore, the Court will apply Colorado law in deciding whether personal
 17 jurisdiction is appropriate under the Colorado long-arm statute and the Court will apply
 18 Ninth Circuit law in deciding whether jurisdiction is appropriate under the due process
 19 clause. See In re Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1174 (D.C.
 20 Cir. 1987) (concluding that “the transferee court [should] be free to decide a federal claim
 21 in the manner it views as correct without deferring to the interpretation of the transferor
 22 circuit.”); Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir. 1993) (holding that “a transferee
 23 federal court should apply its interpretations of federal law, not the constructions of federal
 24 law of the transferor circuit”).

25 Under the Colorado long-arm statute, “[e]ngaging in any act enumerated in this
 26 section by any person, whether or not a resident of the state of Colorado, either in person or

1 by an agent, submits such person and, if a natural person, such person's personal
 2 representative to the jurisdiction of the courts of this state" Colo. Rev. Stat. § 13-1-
 3 124(1) (2007). Examples of enumerated acts include transacting business within Colorado,
 4 committing a tortious act within Colorado, and owning, using, or possessing real estate in
 5 Colorado. *Id.* However, because Colorado's long-arm statute "extends Colorado's
 6 jurisdiction to the limit of the federal constitution, the 'only concern is whether . . .
 7 maintenance of the suit . . . would . . . offend the due process clause of the Fourteenth
 8 Amendment.'" *Cameron v. Group Voyagers, Inc.*, 308 F. Supp. 2d 1232, 1239 (D. Colo.
 9 2004) (quoting *Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 455 (10th Cir.
 10 1996) (internal citations omitted)).

11 To satisfy due process, a nonresident defendant must have "minimum contacts"
 12 with the forum state so that the assertion of jurisdiction does not offend traditional notions
 13 of fair play and substantial justice. *Pebble Beach Co.*, 453 F.3d at 1155 (citing *Int'l Shoe*
 14 *Co. v. Washington*, 326 U.S. 310, 315 (1945)). A federal district court may exercise either
 15 general or specific personal jurisdiction. See *Helicopteros Nacionales de Colombia, S.A. v.*
 16 *Hall*, 466 U.S. 408, 414-15 (1984). Because Plaintiffs do not contend general jurisdiction
 17 applies, the Court will determine whether specific jurisdiction exists in this case.

18 A nonresident defendant's contacts with the forum state may permit the exercise
 19 of specific jurisdiction if: (1) the defendant has performed some act or transaction within
 20 the forum or purposefully availed himself of the privileges of conducting activities within
 21 the forum, (2) the plaintiff's claim arises out of or results from the defendant's forum-
 22 related activities, and (3) the exercise of jurisdiction over the defendant is reasonable.
 23 *Pebble Beach Co.*, 453 F.3d at 1155-56. "If any of the three requirements is not satisfied,
 24 jurisdiction in the forum would deprive the defendant of due process of law." *Omeluk v.*
 25 *Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995).

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1 Under the first prong of the “minimum contacts test,” the plaintiff must establish
2 either that the defendant “(1) purposefully availed himself of the privilege of conducting his
3 activities in the forum, or (2) purposefully directed his activities toward the forum.” Pebble
4 Beach, 453 F.3d at 1155. “Evidence of availment is typically action taking place in the
5 forum that invokes the benefits and protections of the laws in the forum.” Id. Evidence of
6 direction usually consists of conduct taking place outside the forum that the defendant
7 directs at the forum. Id. at 1155-56.

8 The purposeful direction aspect of the first prong is satisfied when a foreign act is
9 both aimed at and has effect in the forum. Id. In other words, the defendant “must have (1)
10 committed an intentional act, which was (2) expressly aimed at the forum state, and (3)
11 caused harm, the brunt of which is suffered and which the defendant knows is likely to be
12 suffered in the forum state.” Id. To satisfy the third element of this test, the plaintiff must
13 establish the defendant’s conduct was “expressly aimed” at the forum; a “mere foreseeable
14 effect” in the forum state is insufficient. Id. The “express aiming” requirement is satisfied
15 when the defendant is alleged to have engaged in wrongful conduct “individually targeting
16 a known forum resident.” Bancroft & Masters, Ins. v. Augusta Nat. Inc., 223 F.3d 1082,
17 1087 (9th Cir. 2000).

18 The second prong of the specific jurisdiction test requiring that the contacts
19 constituting purposeful availment or purposeful direction give rise to the current action, is
20 measured in terms of “but for” causation. Id. at 1088. Under the last prong of the specific
21 jurisdiction test, courts generally consider a variety of factors to determine whether
22 exercising jurisdiction would be reasonable:

23 (1) the extent of the defendant’s purposeful interjection into the forum
24 state, (2) the burden on the defendant in defending in the forum, (3) the
25 extent of the conflict with the sovereignty of the defendant’s state, (4)
26 the forum state’s interest in adjudicating the dispute, (5) the most
efficient judicial resolution of the controversy, (6) the importance of
the forum to the plaintiff’s interest in convenient and effective relief,
and (7) the existence of an alternative forum.

1 Id. A court must balance all seven factors and no factor is determinative. Core-Vent Corp.
2 v. Nobel Indus., 11 F.3d 1482, 1488 (9th Cir. 1993).

3 Where the issue is before the Court on a motion to dismiss based on affidavits
4 and discovery materials without an evidentiary hearing, the plaintiff must make “a prima
5 facie showing of facts supporting jurisdiction through its pleadings and affidavits to avoid
6 dismissal.” Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284
7 F.3d 1114, 1119 (9th Cir. 2002). The Court accepts as true any uncontroverted allegations
8 in the complaint and resolves any conflicts between the facts contained in the parties’
9 evidence in the plaintiff’s favor. Id. However, for personal jurisdiction purposes, a court
10 “may not assume the truth of allegations in a pleading which are contradicted by affidavit.”
11 Alexander v. Circus Circus Enter., 972 F.2d 261, 262 (9th Cir. 1992).

12 Plaintiffs’ Complaint alleges CenterPoint is a Texas corporation with its principal
13 place of business in Houston, Texas and is the parent of RES. Plaintiffs also allege
14 CenterPoint wholly controls and dominates RES and is responsible for RES’s illegal acts in
15 Colorado. Plaintiffs also aver CenterPoint, through its affiliates, buys and sells natural gas,
16 including its own or its affiliates’ production, in the United States and in the State of
17 Colorado. However, Dauphin’s Declaration states CenterPoint has no corporate
18 relationship with or ownership interest in RES. Dauphin also states CenterPoint has never
19 engaged in business in Colorado and has never bought, sold, or traded natural gas or
20 reported wholesale natural gas prices.

21 Dauphin’s Declaration contradicts Plaintiffs’ allegations in the Complaint and
22 therefore the Court may not assume the truth of Plaintiffs’ allegations. Further, in the face
23 of contradictory evidence, Plaintiffs were required to come forward with proof to support
24 their jurisdictional allegations to avoid dismissal. Plaintiffs have not submitted evidence to
25 support their jurisdictional allegations and therefore have failed to meet their burden.
26 Based on Dauphin’s Declaration, CenterPoint is not subject to jurisdiction in Colorado for

1 its own contacts or RES's alleged contacts with Colorado. Moreover, while Plaintiffs have
 2 alleged other Defendants in this action entered into a conspiracy to affect natural gas prices,
 3 and that those Defendants are subject to personal jurisdiction in Colorado based upon the
 4 activities of co-conspirators, Plaintiffs have made no allegations that CenterPoint entered
 5 into a conspiracy. Accordingly, CenterPoint is not subject to personal jurisdiction in
 6 Colorado based on a tortious act² or conspiracy theory of personal jurisdiction.³ The Court
 7 therefore will grant CenterPoint's motion to dismiss.

8 **III. CONCLUSION**

9 IT IS THEREFORE ORDERED that Specially Appearing Defendant CenterPoint
 10 Energy, Inc.'s Motion to Dismiss and Memorandum of Points and Authorities in Support
 11 (2:03-CV-1431-PMP-PAL, Doc. #460) is hereby GRANTED. Plaintiffs' Complaint is
 12 hereby dismissed without prejudice against Defendant CenterPoint Energy, Inc. for lack of
 13 personal jurisdiction.

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 15 DATED: August 17, 2007.

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18 PHILIP M. PRO
 19 United States District Judge

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 24 ² Plaintiffs argue that antitrust conspiracies are tortious acts for personal jurisdiction purposes.
 25 However, because Plaintiffs did not allege CenterPoint engaged in a conspiracy or any other tort
 26 affecting Colorado, the tortious act theory of personal jurisdiction is inapplicable here.

³ Because Plaintiffs did not allege CenterPoint entered into a conspiracy, the Court need not
 rule on the viability of the conspiracy theory of personal jurisdiction at this time.